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**In the**

# Supreme Court of the United States

MARSHA SEIBER, et vir.,

*Petitioners,*

v.

STATE OF OREGON, et al.,

*Respondents.*

**On Petition for Writ of Certiorari to the Oregon Court of Appeals**

## BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION, OREGON FARM BUREAU FEDERATION, AND OREGON CATTLEMEN'S ASSOCIATION IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Where the government requires a property owner to submit to the physical occupation of its land, may the government evade liability for a physical taking merely because it did not "cause or induce" the occupation?

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## INTEREST OF AMICI CURIAE

For nearly three decades, amicus Pacific Legal Foundation (PLF) has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Finally, PLF has participated as amicus curiae in nearly every major real property takings case, and numerous other takings cases, heard by this Court in the past two decades.[1]

Oregon Farm Bureau Federation has represented the interests of farmers, ranchers, and small timber owners for the past 77 years as the largest general agricultural organization in that state. With more than 20,000 members, Oregon Farm Bureau Federation represents one of the largest blocks of private landowners in Oregon. Because of the climate and geography that prevail there, many farms and ranches contain forestland. For this reason, many of Oregon's agricultural producers are primarily forest managers. As such, they are directly affected by restrictions on access to privately owned resources like the restrictions imposed in this case by the state Board of Forestry. The impact of such restrictions is especially dramatic on small landowners like the Seibers. A judicial decision as to whether and in what circumstances the public must compensate private

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

property owners who are restricted in their use and possession of resources will have a direct effect on the members of Oregon Farm Bureau Federation.

The Oregon Cattlemen's Association is a nonprofit organization comprising 2,500 members from across the state. The Association works to apply environmentally and scientifically sound industry practices, promote research and education on water quality and habitat, integrate economic use of natural resources with sustainability, promote a positive image of the cattle industry, improve the economics of the cattle industry, and assure a strong political presence in all areas affecting the industry.

A large number of families in Oregon Farm Bureau Federation and the Oregon Cattlemen's Association are owners of non-industrial timberlands. These timberlands are typically managed as an integral part of a farm or ranch, and they often produce some combination of livestock, vineyards, orchards, and grain as well as a limited amount of timber itself. These privately owned, non-industrial timberlands consist almost exclusively of planted regrowth, which provides not only essential economic support for overall agricultural operations but also important blocks of habitat for wildlife coexisting with carefully planned harvest operations. None of these economic and ecological benefits would exist apart from the investment, industriousness, and stewardship of private landowners.

The ability to enter and harvest timber resources in response to farm or ranch economics and market opportunities is essential to the viability of these family agricultural enterprises. Unpredictable interference with harvests for the purpose of setting aside wildlife habitat may deprive these families of critical assets at a time when they may be badly needed to offset unexpected costs or crop losses. Furthermore, such delays can even result in a total loss of the timber. There is great risk inherent in holding a long-maturing asset that may be destroyed

at any time by fire—a loss that is economically uninsurable for non-industrial operations. Forcing families to forego harvesting their timber so that it can serve as a set-aside for habitat, therefore, not only deprives them of current income that may be critical to economic viability, it also forces them to bear the uncompensated risk that they will lose their total investment. Whether the state has the power—without the payment of any compensation—to place these burdens on private landowners for the purpose of aiding admittedly public wildlife resources is a question of vital importance to CFBF members.

## SUMMARY OF ARGUMENT

The Seibers alleged—and no court disagreed—that they were required to submit to the physical occupation of their land by spotted owls as a result of the Oregon Board of Forestry's timber-harvesting regulations. Without questioning this allegation, the courts below rejected the Seibers' physical takings claim on the theory that the state could not be liable for a compensable taking by permanent physical occupation if the state did not "cause or induce" the occupation. In so deciding, the lower court decided an important question of federal takings law in a way that conflicts with this Court's takings jurisprudence and with the decisions of other lower courts.

*First*, this Court's decisions make clear that the government effects a physical taking whenever it requires a property owner to submit to the physical occupation of his land or (to say the same thing) whenever it deprives the owner of the right to exclude strangers. Under either formulation, it is *required acquiescence* that is the touchstone of a compensable physical occupation. This Court's decisions further make clear that the government cannot evade takings liability merely because the instrument of the required occupation was not the government itself but rather a third party. In none of these decisions did the Court make the government's "causing or inducing" the third-

party occupation a prerequisite to liability. Indeed, in each of the cases, the government merely "permitted" the occupation, which resulted from the independent choice of a third party.

*Second*, lower courts have applied this Court's physical takings jurisprudence in a manner that conflicts with the decision below. These courts have found that physical takings are (or would be) effected by two federal regulatory schemes that require property owners to acquiesce in physical occupations by their competitors. Under neither of these schemes could the government be said to "cause or induce" the occupations, and no court made such causing or inducing a prerequisite to finding a taking. Moreover, the courts rejected the argument that a required acquiescence in a physical occupation could be justified as a "permissible regulation of the *use* of real property."

## ARGUMENT

### IN RULING THAT A STATE CANNOT BE LIABLE FOR A PERMANENT PHYSICAL OCCUPATION IF IT DOES NOT "CAUSE OR INDUCE" THE OCCUPATION, THE COURT BELOW DEPARTED FROM THIS COURT'S DECISIONS AND EXACERBATED A CONFLICT AMONG THE LOWER COURTS

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), this Court identified "at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." The first instance of what are called "categorical" takings "encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property." *Id.* As to such physical invasions—also called physical "occupations"—the law is that "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.* As set forth below, the Seibers suffered this kind of categorical taking when the State forced them to submit to the physical occupation of their land by spotted

owls. In determining otherwise, the Oregon courts rejected this Court's physical takings jurisprudence and exacerbated a split in the lower courts on an important question of takings law.

**A. The Issue and the Lower Court's Ruling**

In its most recent consideration of categorical takings by physical occupation, this Court explained that the government effects a physical taking whenever "it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992). To rephrase the point, a physical taking occurs whenever the government deprives a property owner of his "right to exclude," a right that is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 528 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). In either formulation, it is the "element of *required acquiescence* [that] is at the heart of the concept of occupation." *Id.* at 527 (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987)). Indeed, the Court recently noted the obvious point that this required acquiescence is often effected by means of *regulation*: where "regulations . . . require the [property owner] to suffer the physical occupation of a portion of his building," they will be analyzed not as regulatory takings but rather as physical takings. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1479 n.18 (2002) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)).

In the present case, the Seibers alleged in their inverse condemnation complaint that the purpose of the Oregon Board of Forestry's regulations was to *require* every timberland owner to maintain any property containing spotted owl nests in such a manner that the property could "be *occupied* annually by a pair of adult spotted owls who are capable of breeding." Petition Appendix (Pet. App.) at 38a (emphasis added). The complaint further alleged that the Board "requir[ed]" the Seibers to

maintain their timberland in such fashion that the land could "be *occupied* as a spotted owl nesting site" without any time limitation. *Id.* (emphasis added). In brief, the Seibers alleged that the Board intended to, and in fact did, require them to submit to the physical occupation of their land by spotted owls. Or, to frame the allegation in other pertinent terms, the Board deprived the Seibers of the right to exclude the owls from their property and instead required them to acquiesce in the owls' presence on their land. In so alleging, the Seibers successfully stated a claim for a categorical taking by physical occupation under this Court's precedents.

Without in any manner questioning the accuracy of the Seibers' allegations concerning the purpose and effect of the Board of Forestry's regulations, the Oregon courts rejected the Seibers' physical occupation claim. It is apparent that this rejection was based on the published decision in *Boise Cascade Corp. v. State ex rel. Board of Forestry*, 991 P.2d 563 (Or. Ct. App. 1999), *cert. denied*, 532 U.S. 923 (2001). *See, e.g.*, Pet. App. at 11a (granting the State's motion for summary judgment with respect to the Seibers' physical occupation claim "based on the Court of Appeals' decision in *Boise Cascade*"). In the *Boise Cascade* decision, which rejected a physical occupation claim identical to the claim advanced by the Seibers, the court reasoned as follows: "The state did not cause or induce the spotted owls to breed on [Boise's] property. The state simply regulated [Boise's] use of the property based on the presence of the spotted owls there." 991 P.2d at 570. As set forth below, this reasoning is flawed: the decisions of this Court demonstrate that the Oregon court erred in holding that the government must "cause or induce" an occupation in order to effect a physical taking. More to the point perhaps, the decision below is in conflict with the decisions of many other lower courts.[2]

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[2] It is not unusual for this Court to grant review of an unpublished decision as a means of reviewing the earlier, published ruling that

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**B. The Conflict with This Court**

In *Kaiser Aetna*, the property owners converted a privately owned lagoon into a marina, thereby connecting the lagoon to a publicly owned bay; subsequently, the United States sought "an injunction to require [the owners] to allow public access" to the waters of the marina on the ground that it had become subject to the federal "navigational servitude." 444 U.S. at 169. Having ruled that "Congress could assure the public a free right of access to the [waters of the marina] if it so chose," *id.* at 174, this Court went on to consider whether Congress could do so "without invoking its eminent domain power and paying just compensation," *id.* at 180. The Court emphatically ruled that Congress could ***not***, because "the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina." *Id.* (emphasis added). But just who would actually be doing the "invading"? Not the government, of course, but rather members of the boating "public" based on their own independent choices. To use the Oregon court's terms, the government did not "cause or induce" anyone to sail into the marina; instead, the government "ha[d] no control over where" public boaters chose to navigate their boats. *Boise Cascade*, 991 P.2d at 570. In other words, it was no defense to this Court's finding a physical taking in *Kaiser Aetna* that members of the boating public were not placed or induced onto or into the waters of the private marina by the government or its agents.

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[2] (...continued)
actually drove the outcome below. *Compare McGill v. Duckworth*, 503 U.S. 907 (1992) (denying certiorari to *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991)), *with Farmer v. Brennan*, 511 U.S. 825 (1994) (reviewing the Seventh Circuit's ruling in *McGill* by means of a case in which that court had issued no opinion). *Cf. Chisom v. Roemer*, 501 U.S. 380 (1991) (granting review to consider the Fifth Circuit's en banc decision in a previous case).

*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), is similar in essential regards. In that case, "New York law provide[d] that a landlord must permit a cable television company to install its cable facilities upon his property." *Id.* at 421. This Court concluded that "such a physical occupation of property is a taking." *Id.* Yet again, it was not the *government* (or its agents) that occupied the landlord's property; rather, the occupier was a privately owned cable television company acting on its own behest. Indeed, the Court characterized the case as one in which the government's regulations "require[d] the landlord to suffer the physical occupation of a portion of his building *by a third party*." *Id.* at 440 (emphasis added); *accord Florida Power Corp.*, 480 U.S. at 252 (quoting same); *Tahoe-Sierra*, 122 S. Ct. at 1479 n.18 (quoting same). As relevant to the present case, it is crucial to recognize that the New York City government did not "cause or induce" the cable company to occupy the property of the landlord. 991 P.2d at 570. No, the government merely "permit[ted]" the occupation, *Loretto*, 458 U.S. at 421, and thereafter "simply regulated [the landlord's] use of the property based on the presence of the [cable facilities] there," 991 P.2d at 570—that is, prohibiting the landlord from taking any action that would interfere with or otherwise disturb those facilities.

Finally, in *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987), this Court held that had the government "required the [property owners] to make an easement across their beachfront available to the public on a permanent basis . . . , we have no doubt there would have been a taking." The Court reached this conclusion *even though* that property would have been periodically occupied not by the government, but by random members of the beachgoing public:

> In *Loretto* we observed that where governmental action results in "a permanent physical occupation" of the property, by the government itself *or by others*, "our cases uniformly have found a taking to the ex-

> tent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

*Id.* at 831-32 (emphasis added and citations omitted) (quoting *Loretto*, 458 U.S. at 432-35). *Nollan* therefore confirms that physical occupations may be effected "by the government itself *or by others*." Because the government in no way caused or induced the public to traverse the property owners' beachfront —the government merely required that a lateral easement be made "available"—*Nollan* also confirms that the government's *causing or inducing* the occupation is not a prerequisite to its liability for a categorical taking by physical occupation.

**C. The Conflict with Other Lower Courts**

In the past decade, a variety of statutory and regulatory schemes have required the lower courts to apply this Court's physical takings jurisprudence. Several of the resulting decisions are in conflict with the decision below.

We turn first to the "mandatory access provision" of the federal Pole Attachment Act. Under that provision, a public utility company "shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it" for the purpose of installing and carrying television or telephone wires. 47 U.S.C. § 224(f)(1). Under implementing regulations issued by the Federal Communications Commission, a cable or telephone company's access to, and use of, a utility's property to install and carry wires is triggered by a *request* from that company.[3] Accordingly, any use of that property by third

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[3] *See* 47 C.F.R. § 1.1403(b) ("*Requests for access* to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing." (emphasis added)); 61 Fed. Reg. 45,476, 45,588 (1996) (observing that the statute "reflects Congress'

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parties depends on the independent choices of those parties. In other words, just as in *Nollan*, the statute in no way *causes or induces* cable or telephone companies to use the utility's property; rather, the statute "requires that poles, ducts, conduits and rights-of-way controlled by utilities [be] *made available*" to requesting companies.[4]

Notwithstanding the lack of causation or inducement on the part of the government, the Eleventh Circuit had no trouble concluding that "the Act's mandatory access provision effects a [physical] taking of a utility's property." *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (11th Cir. 1999) (citation omitted). The court readily recognized that, like the Seibers vis-à-vis nesting owls, a utility "has no choice but to permit a cable [or telephone company] to permanently occupy physical space" on or in its property. *Id.* In contrast to the state courts that decided and applied *Boise Cascade*, the Eleventh Circuit correctly perceived that "[s]uch a permanent, physical occupation of property falls squarely within the *Loretto* rule." *Id.* at 1329.

The conflict is even more explicit, however. Recall that the court below ruled that requiring property owners to acquiesce in the presence of the owls did not effect a physical occupation because the Board of Forestry "*simply regulated* [the]

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[3] (...continued)
determination that utilities generally must accommodate *requests for access* by telecommunications carriers and cable operators" (emphasis added)); *id.* at 45,593 ("Section 224(f)(1) mandates that a utility grant access to a *requesting* telecommunications provider or cable system operator . . . ." (emphasis added)).

[4] H.R. Conf. Rep. No. 104-458, *reprinted in* 142 Cong. Rec. H1078, H1133 (Jan. 31, 1996) (emphasis added) (discussing "Section 204 of the Senate bill"); *cf. id.* at H1134 (observing that as to Section 204, "[t]he conference agreement adopts the Senate provision with modifications").

use of the property based on the presence of the spotted owls there." *Boise Cascade*, 991 P.2d at 570 (emphasis added). The Eleventh Circuit confronted a similar argument—"the mandatory access provision [is] a *simple regulatory* condition"—and quickly rejected it as "meritless." *Gulf Power Co.*, 187 F.3d at 1330 (emphasis added). "Characterizing the mandatory access provision as a regulatory condition," concluded the court, "cannot change the fact that it effects a taking by requiring a utility to submit to a permanent, physical occupation of its property." *Id.* at 1331.

More generally, the "power to regulate [property] does not extend to taking without just compensation the right of a [property owner] to exclude unwanted occupiers of its property." *Id.* As the Eleventh Circuit observed, among other arguments this Court rejected in *Loretto* "was the argument that the statute was merely a 'permissible regulation of the use of real property.' . . . [A]lthough property is subject to broad regulatory power, a regulation becomes a taking when the government authorizes permanent physical occupation by a third party." *Id.* at 1328 (quoting *Loretto*, 458 U.S. at 439).

We turn next to another "access" scheme, this one called "physical co-location," under which local telephone exchange companies (LECs) are required "to set aside a portion of their central offices for occupation and use by competitive access providers" (CAPs). *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1443 (D.C. Cir. 1994). "In physical co-location," according to the D.C. Circuit, "the CAP strings its cable to the LEC central office"; the LEC "must then turn over space within the central office in which the CAP may install and operate its circuit terminating equipment." *Id.* at 1444. The *Bell Atlantic* litigation involved a challenge to an FCC order that generally "require[d] LECs to permit CAPs to connect their facilities to the LEC network through" physical co-location. *Id.* In sustaining this challenge, the D.C. Circuit concluded that the order "directly implicates the Just Compensation Clause of the Fifth

Amendment, under which a 'permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.' " *Id.* at 1445 (quoting *Loretto*, 458 U.S. at 426). Why? Because it would result in "an identifiable class of cases in which application of [the order] will necessarily constitute a taking." *Id.* (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985)).[5]

Like the Eleventh Circuit's decision in *Gulf Power*, the D.C. Circuit's decision in *Bell Atlantic* cannot be squared with *Boise Cascade*. Although the challenged FCC order was said to "require" physical co-location, *Bell Atlantic*, 24 F.3d at 1443, that was merely shorthand for saying that physical co-location was required *if, and only if, it was requested by the CAP*. *See id.* at 1444 (framing issue as whether "the Commission lacks authority . . . to require LECs to permit physical co-location of equipment *upon demand*" (emphasis added)). In other words, perhaps to labor the point, the order found to effect a physical taking in *Bell Atlantic* surely did not *cause or induce* the CAP to occupy LEC property. Therefore, the fact that "[t]he state did not cause or induce the spotted owls to breed on [the] property," *Boise Cascade*, 991 P.2d at 570, offers no basis for distinguishing the decisions of the Oregon courts. No basis, that

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[5] *Accord GTE Service Corp. v. FCC*, 205 F.3d 416, 421 (D.C. Cir. 2000) (vacating a subsequent FCC co-location order in part because it "may result in unnecessary [physical] takings of LEC property"); *GTE Southwest Inc. v. Public Utility Commission*, 10 S.W.3d 7, 11 (Tex. App. 1999) (ruling that "the Commission's order amounts to a physical or per se taking of GTE's cables and facilities by requiring that GTE surrender its right to exclude others from physical use of its properties"); *id.* at 13 (explicitly "disagree[ing]" with the contention that "the Commission's order amounts not to a taking in the *Loretto* sense, but only to permissible regulation"); *GTE Northwest Inc. v. Public Utility Commission*, 900 P.2d 495 (Or. 1995) (invalidating state-law physical co-location scheme as a physical taking), *cert. denied*, 517 U.S. 1155 (1996).

is, other than a straightforward conflict in the interpretation of federal takings law.[6]

In all of these cases it could reasonably be asserted, as the court asserted in *Boise Cascade*, that the government "simply regulated [owners'] use of the property based on the presence of" the occupying instrumentalities. 991 P.2d at 570. That is, whenever boaters, cable equipment, telephone equipment, or beachgoers were "present" on their property, the owners were restricted in their "use" of it. But the restrictions were of a particular kind: the owners could not use their property in ways that would interfere with the occupiers' government-sanctioned use. That is precisely the kind of "regulation" the Seibers endured based on the presence of spotted owls—restrictions on using their forestland in ways that would interfere with owls' present and future use of that same land as habitat. That is, the Seibers' use of their property was not regulated in the abstract; it was regulated for the purpose of—and with the actual effect of—requiring the Seibers to acquiesce in the owls' presence and, concomitantly, preventing them from excluding the owls. The *whole point* of the Board of Forestry regulations applied against the Seibers is to ensure that spotted owls remain in their nests on the designated property. *See, e.g.*, Or. Admin. R. 629-665-0210(1)(b) (mandating that every timber harvesting plan

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[6] In the reported decisions discussed herein, the range of things that can effect takings by physical occupation runs from humans (*Kaiser Aetna* and *Nollan*) all the way to inanimate objects (*Loretto*, *Gulf Power*, and *Bell Atlantic*). Moreover, one can easily imagine takings by physical occupation where domestic animals are involved; e.g., the government requires *A* to open his pastureland to grazing by *B*'s cattle. Given this spectrum, there is no reason why "wild" animals such as spotted owls should be categorically excluded from physical occupation analysis. Certainly, it cannot be because the government does not "control" wild animals. As the decisions demonstrate, what counts is not control by the government but "required acquiescence" on the part of the property owner. *Yee*, 503 U.S. at 527.

provide for "[p]revention of disturbances resulting from operation activities *which cause*[] *owls to flush from* [i.e., *leave*] *the nesting site*" (emphasis added)), *in* Pet. App. at 22a.

If the government could be liable for a taking by physical occupation in *Kaiser Aetna*, *Loretto*, or *Nollan* without having "caused or induced" the third-party occupations, the government can be (and is) liable for such a taking in the present case. If "simply regulating" private property based on the presence of government-sanctioned third-party occupiers could effect a physical taking in *Kaiser Aetna*, *Loretto*, or *Nollan*, it can (and did) effect such a taking here. In ruling otherwise, the Oregon courts departed from this Court's takings jurisprudence, thereby exacerbating a conflict among the lower courts. The Court should grant the petition for certiorari to resolve that conflict.

## CONCLUSION

The petition for writ of certiorari should be granted.

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